

# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

September 27, 2017

Christopher J. Carr  
Baker Botts L.L.P.  
101 California Street, Suite 3600  
San Francisco, CA 94111

SUBJECT: Public Records Act Request Re: Westpoint Harbor; Records Exempt from Disclosure

Dear Mr. Carr:

By letter dated September 12, 2017, I provided an initial, partial response to your letter of September 7<sup>th</sup> concerning your August 7<sup>th</sup> California Public Records Act ("PRA") request for records that relate to the allegations in the Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint") issued by the Executive Director to your clients, Mark Sanders and Westpoint Harbor, LLC (hereafter "Respondents"). Your September 7<sup>th</sup> letter alleges that the documents concerning Westpoint Harbor that BCDC had previously disclosed do not comply with the PRA "because (1) BCDC has not provided specific public records that are relevant; and (2) BCDC has not presented valid exemptions as a basis for withholding other public records." My September 12<sup>th</sup> letter responded to the 19 specific documents discussed on pages 1-4 of your September 7<sup>th</sup> letter that you contended BCDC had improperly failed to provide. Subsequently, I sent you a series of emails, on September 14<sup>th</sup>, 15<sup>th</sup>, and 19<sup>th</sup>, each including a Dropbox link or links to electronic copies of additional documents responsive to your PRA request. This letter responds to the remaining issues raised in your September 7<sup>th</sup> letter and, in particular, provides further descriptive information regarding the documents withheld as exempt from disclosure under the PRA and the bases for applicable exemptions.

In summary, BCDC has now provided and/or made available to you the complete hard copy and electronic permitting and enforcement files for Westpoint Harbor, electronic copies of documents in individual staff folders for Westpoint Harbor, and hard copy and electronic copies of emails responsive to your PRA request that are not exempt from disclosure under the PRA. The disclosed records include documents related to the BCDC permit and permit amendments for Westpoint Harbor, Respondents' compliance with or alleged violations of the permit, as amended, and all correspondence between BCDC staff and Mr. Sanders, his representatives, or third parties. The disclosed records include all factual information related to the permit and permit amendments, Respondents' compliance with or alleged violations of the permit, and the ongoing enforcement action.

The records that have been withheld as exempt from disclosure under one or more PRA exemptions are preliminary draft documents, most of which were prepared by BCDC counsel, internal communications among BCDC staff, including BCDC counsel, concerning such draft documents, and staff evaluations of compliance issues, all of which relate to BCDC staff's deliberative process in reaching staff decisions related to the enforcement action against Respondents. Those decisions include but are not limited to the content of and positions taken in final documents issued for public review including: (1) the Violation Report/Complaint; (2) permit amendments; and (3) correspondence from the agency to Mr. Sanders or his representatives concerning alleged violations or permit amendments.

We reject your unwarranted and unsupported demand that "BCDC provide a privilege log for documents withheld on the basis of the attorney-client privilege, attorney work-product doctrine, and deliberative process privilege." In *Haynie v. Superior Court*, 26 Cal. 4<sup>th</sup> 1061, 1074-1075 (2001), the California Supreme Court held that the PRA does not require a public agency to describe "each of the documents falling within the statutory exemption," or to prepare an inventory of potentially responsive documents, and noted that the "burdens and risks of such a requirement appear substantial." Nevertheless, this letter generally describes the four categories of withheld documents, identifies the statutory bases on which each document in each category is exempt from PRA disclosure, and demonstrates the applicability of each exemption to each category of withheld documents.

#### **I. CATEGORIES OF WITHHELD DOCUMENTS**

Four categories of potentially responsive documents, as described below, have been withheld as exempt from disclosure. The PRA exemptions applicable to the documents in each category are identified following the descriptions of the documents. This letter then demonstrates the applicability of each exemption.

**Category 1.** This category includes preliminary drafts documents in Word format prepared by BCDC's Chief Counsel. This category includes preliminary drafts of the Violation Report/Complaint, or portions of the Violation Report/Complaint, preliminary drafts of correspondence to Mr. Sanders, and preliminary drafts of the proposed cease and desist and civil penalty order that will be a part of the Executive Director's Recommended Enforcement Decision. See 14 C.C.R. § 11326(b)(5).

- Each document in this category is exempt from disclosure pursuant to federal or state law, including but not limited to, the provisions of the Evidence Code and Code of Civil Procedure relating to the attorney-client privilege and the attorney work-product privilege. Gov't Code § 6254(k); Evid. Code § 952; Code Civ. Proc. § 2018.030.

**Category 2.** This category includes email communications between or among BCDC staff, including BCDC counsel, commenting on or suggesting revisions to the documents described in Category 1, above. Category 2 includes redlined versions of the Word documents described in Category 1 providing staff comments on or suggested revisions to such documents.

- Each document in this category is exempt from disclosure pursuant to federal or state law, including but not limited to, the provisions of the Evidence Code relating to the attorney-client privilege. Gov't Code § 6254(k); Evid. Code § 952.

**Category 3.** This category includes preliminary draft documents prepared by BCDC staff other than agency counsel, including preliminary drafts of correspondence to Mr. Sanders or his representatives and preliminary drafts of proposed permit amendments. This category also includes email communications between or among BCDC staff, in most cases including agency counsel, providing comments on or suggested revisions to the documents in this category, as well as redlined versions of the Word documents described in this category providing staff's or counsel's comments on or suggested revisions to such documents.

- Each preliminary draft document in this category is exempt from disclosure as a preliminary draft that is not retained by BCDC in the ordinary course of business and for which the public interest in nondisclosure of the record clearly outweighs the public interest in disclosure. Gov't Code § 6254(a).
- Each document in this category is also exempt from disclosure under the "deliberative process privilege" and for which the public interest in nondisclosure of the record clearly outweighs the public interest in disclosure. Gov't Code § 6255; *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1339-1345 (1991).
- Each document within this category provided to BCDC counsel for review and comment, or prepared by BCDC counsel, including emails and redlines of Word documents providing counsel's comments on or suggested revisions to such documents, is exempt from disclosure pursuant to federal or state law, including but not limited to, the provisions of the Evidence Code and Code of Civil Procedure relating to the attorney-client and attorney work-product privileges. Gov't Code § 6254(k); Evid. Code § 952; Code Civ. Proc. § 2018.030.

**Category 4.** This category includes documents prepared by BCDC staff other than counsel that present staff's analysis or evaluation of alleged violations at Westpoint Harbor and/or that evaluate potential enforcement options for seeking to resolve certain violations. This category also includes email communications from BCDC staff providing documents in this category to BCDC's counsel to assist counsel in preparing the Violation Report/Complaint.

- Each document in this category is exempt from disclosure under the "deliberative process privilege" and for which the public interest in nondisclosure of the record clearly outweighs the public interest in disclosure. Gov't Code § 6255; *Times Mirror Co.*, 53 Cal. 3d at 1339-1345.
- Each email communication from BCDC staff providing documents in this category to BCDC counsel to assist counsel in preparing the Violation Report/Complaint is also exempt from disclosure pursuant to federal or state law, including but not limited to, the provisions of the Evidence Code relating to the attorney-client privilege. Gov't Code § 6254(k); Evid. Code § 952.

## **II. ATTORNEY WORK-PRODUCT PRIVILEGE AND ATTORNEY CLIENT PRIVILEGE**

Documents prepared by BCDC counsel, preliminary drafts or otherwise, are writings "that reflect an attorney's impressions, conclusions, opinions, or legal research or theories" and, therefore, are exempt from PRA disclosure under the attorney work-product privilege. (Code Civ. Proc. § 2018.030.) In addition, communications between BCDC counsel and BCDC staff, including staff comments on draft documents prepared by counsel and counsel's comments on draft documents prepared by staff, in the course of BCDC counsel providing legal advice to staff regarding this ongoing enforcement action, including the content of final documents to be issued by staff relating to Westpoint Harbor, are exempt from PRA disclosure as attorney-client privileged communications. (Evid. Code § 952.) Thus, each document prepared by BCDC counsel, each document prepared by staff providing comments or analysis to counsel, and all written communication between BCDC counsel and staff, in any of the above-described Categories 1 through 4, are exempt from disclosure under the PRA pursuant to Government Code Section 6254(k).

## **III. PRELIMINARY DRAFTS NOT RETAINED IN THE ORDINARY COURSE OF BUSINESS FOR WHICH THE PUBLIC INTEREST IN NONDISCLOSURE CLEARLY OUTWEIGHS THE PUBLIC INTEREST IN DISCLOSURE**

There are three conditions for the Government Code section 6254(a) exemption: "(1) The record sought must be a preliminary draft, note, or memorandum; (2) which is not retained by the public agency in the ordinary course of business; and (3) the public interest in withholding must clearly outweigh the public interest in disclosure." *Citizens for a Better Environment v.*

*Dept. of Food and Agriculture* (1985) 171 Cal. App. 3d 704, 711-712 (1985). "The purpose of the exemption is to provide a measure of agency privacy for written discourse concerning pending administrative action." *Id.* at 712.

Each of the preliminary draft documents in Category 3 was prepared by BCDC staff as part of the deliberative process of evaluating or seeking to address permit compliance issues and alleged violations at Westpoint Harbor. In each case, the process resulted in administrative action by BCDC staff -- issuance of a final document presenting the staff's decision or position on a particular issue or matter (all of which have been disclosed). Thus, each of these documents is a pre-decisional internal communication exempt from disclosure as a preliminary writing under Government Code Section 6254(a).<sup>1</sup> *Citizens for a Better Environment*, 171 Cal. App. 3d at 713-14.

The second condition of the Government Code section 6254(a) exemption is that the records are documents that are not retained in the ordinary course of business. *Citizens for a Better Environment*, 171 Cal. App. 3d at 711. BCDC's Records Retention Schedule, as approved by the Secretary of State on March 15, 2017, establishes that none of the preliminary draft documents in Category 3 will be retained by BCDC in the normal course of business. The Records Retention Schedule includes the following applicable provisions:

- **Regulatory; Enforcement; Analyst Working Papers.** "Files become inactive when final project is completed or purpose has been served." "Non-records including, but not limited to,...superseded drafts, transitory emails, etc. shall not be subject to retention."<sup>2</sup>
- **Regulatory; Permitting; Analyst Working Papers.** "Files become inactive when final project is completed or purpose has been served." "Non-records including, but not limited to,...superseded drafts, transitory emails, etc. shall not be subject to retention."

In your September 12<sup>th</sup> letter, you rely on dicta in the *Citizens for a Better Environment* case to argue that even if BCDC customarily discards preliminary drafts, the exemption does not apply because BCDC's preliminary drafts have not actually been discarded. In that case, the court found that the agency had offered no evidence of its records retention policy.

---

<sup>1</sup> In your September 12<sup>th</sup> letter, you object to my prior comment (in an August 14<sup>th</sup> email) that metadata potentially embedded in a Word document is an attribute of or reflects information concerning a draft document and, therefore, is exempt from disclosure. BCDC acknowledges that the PRA requires an agency to make available information in any electronic format in which it holds the information, and we have since provided you with electronic copies of Word documents contained in the electronic Westpoint Harbor permitting and enforcement files and individual staff folders. We have not withheld any Word document on the grounds that it may contain metadata that is an attribute of or reflects information concerning a draft document.

<sup>2</sup> The Records Retention Schedule further provides: "Transitory e-mails consists of electronic messages that are created primarily for the communication of informal information as opposed to the perpetuation or formalization of knowledge. Destroy transitory e-mails when they have served their purpose."

Nevertheless, the court held that testimony of an agency employee that provided evidence of agency custom was sufficient to uphold the trial court's finding that all of the writings at issue, with one exception, would customarily be discarded by the agency in the ordinary course of business. *Citizens for a Better Environment*, 171 Cal. App. 3d at 714. Therefore, with one exception, the court did not hold that the Government Code section 6254(a) exemption did not apply, and that the documents were required to be disclosed, on the grounds that the preliminary materials had not in fact been discarded as is customary in the ordinary course of business.<sup>3</sup>

The enforcement action against Respondents is ongoing. BCDC's Records Retention Schedule does not provide for the preliminary materials in this matter to be discarded or destroyed until after the enforcement action is completed and the files become inactive. You have cited no case, and we have found none, in which a court has held that the Government Code section 6254(a) exemption is inapplicable to preliminary drafts that exist at the time of a PRA request but would not be retained by the agency in the normal course of business pursuant to an approved Records Retention Schedule. On the contrary, it would be totally inconsistent with the purpose of the exemption – "to provide a measure of agency privacy for written discourse concerning matters pending administrative action" (*Citizens for a Better Environment*, 171 Cal. App. 3d at 712) – to require disclosure of preliminary drafts related to a pending enforcement matter simply because the agency's Records Retention Schedule does not provide for such drafts to be destroyed until after the matter has been completed and the file closed.<sup>4</sup>

The third condition of the Government Code section 6254(a) exemption is that the public interest in nondisclosure of the record clearly outweighs the public interest in disclosure. *Citizens for a Better Environment*, 171 Cal. App. 3d at 711-12. This is the same balancing test that applies to the "deliberative process" exemption under Government Code Section 6255(a), which is discussed below. That discussion, which is incorporated herein by reference, demonstrates that as to each of the preliminary draft documents in Category 3, the public interest in nondisclosure clearly outweighs the public interest in disclosure.

---

<sup>3</sup> Moreover, the preliminary documents at issue in *Citizens for a Better Environment* contained factual information. (See 171 Cal. App. 3d at 715-717.) In contrast, here the preliminary drafts contain staff's preliminary position and comments on draft text, not factual information, and consist of attorney-client communications and preliminary drafts that were subsequently issued as final staff documents which have been disclosed.

<sup>4</sup> In response to your PRA request, BCDC has disclosed a number of versions of proposed Amendment Five of the permit, each of which is a draft document and each of which was provided to Mr. Sanders years ago but which he refused to sign. Unlike the preliminary drafts of permit amendments that have been withheld as exempt from disclosure, the various drafts of proposed Amendment Five: (1) have been retained in the ordinary course of business; and (2) present staff's final position as to the content of proposed Amendment Five as of the time each draft was provided to Mr. Sander (and thereby also became subject to disclosure to the public).

#### IV. DELIBERATIVE PROCESS PRIVILEGE

"Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." *Regents of the University of California v. Superior Court*, 20 Cal. 4<sup>th</sup> 509, 540 (1990). The deliberative process privilege protects material reflecting deliberative or decisionmaking processes. *Wilson v. Superior Court*, 51 Cal. App. 4<sup>th</sup> 1136, 1142 (1996). The catchall exemption from PRA disclosure set forth in Government Code Section 6255 applies to agency records protected by the deliberative process privilege. *Times Mirror Co.*, 53 Cal. 3d at 1339-45. See also *California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4<sup>th</sup> 159, 169-74 (1998).

As the Court of Appeal explained in *California First Amendment Coalition*, there are three policy bases for the deliberative process privilege:

First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that 'officials should be judged by what they decided(,) not for matters they considered before making up their minds.'

67 Cal. App. 4<sup>th</sup> at 170.

Each of these policy considerations applies in connection with each of the records in Categories 3 and 4 that has been withheld from disclosure under the deliberative process privilege. More specifically, for the reasons discussed below, on the facts of this particular case, the public interest served by not disclosing the subject records clearly outweighs the public interest served by disclosure.

**A. Public Interest in Nondisclosure.** There is a strong public interest in BCDC staff and counsel being able to evaluate and candidly discuss alleged permit violations at Westpoint Harbor, potential corrective measures, and enforcement options without being inhibited by the potential that their deliberations will be disclosed to Respondents and the public. The disclosure of preliminary drafts, staff analyses, and internal, pre-decisional communications among BCDC staff and counsel regarding the alleged violations and potential courses of action would impair the functioning of agency staff by discouraging email communications and the exchange of redlines to provide comments on preliminary draft documents. Because it would be more burdensome and both less efficient and effective for staff to discuss unresolved issues and communicate comments only in meetings or by phone, especially since the enforcement

team includes a number of staff members as well as counsel, the result of inhibited written communications would likely be the issuance of final documents by staff that are less accurate and/or less thorough than would be the case if the subject records are protected from disclosure under the deliberative process privilege. See *Humane Society of the United States v. Superior Court*, 214 Cal. App. 4<sup>th</sup> 1233, 1263 (2013) (disclosure of prepublication research communications would fundamentally impair the academic research process); *California First Amendment Coalition*, 67 Cal. App. at 169 (staff evaluations and recommendations are communications to the decisionmaker exempt from disclosure); Cf. *Fortson v. Harvey*, 407 F. Supp. 2d 13, 17 (D.D.C. 2005) (disclosure of investigative findings and recommendations could chill investigator's willingness to engage in an open discussion with superiors with respect to findings and recommendations).

In addition, there is a strong public interest in BCDC's enforcement and permitting decisions concerning Westpoint Harbor being reviewed, commented upon, and/or responded to by Respondents and the public based solely on the content and substance of the staff's final decision documents, and not based on the content of preliminary drafts, staff comments on such drafts, staff evaluations, or internal discussions among staff and counsel that occurred before any final decision or recommendation had been made by staff or the Executive Director. See *California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4<sup>th</sup> at 170 (deliberative process privilege protects the integrity of the decision-making process by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds).

**B. Public Interest in Disclosure.** There is a general public interest in disclosure of records that contain information relating to the conduct of the public's business. In *Humane Society of the United States*, 214 Cal. App. 4<sup>th</sup> at 1268, the Court of Appeal explained that "in assigning weight to the general public interest in disclosure, courts should look to 'nature of the information' and how disclosure of that information contributes to the public's understanding of government." Here, the nature of the information encompasses preliminary draft documents, staff comments on such drafts, staff evaluations, and internal deliberative communications among staff and counsel. While such information might contribute to the public's understanding of BCDC staff's decision-making process, such information is irrelevant to the pending enforcement action against Respondents concerning the alleged violations at Westpoint Harbor. What is relevant to the enforcement proceeding is the content and substance of the Executive Director's and other staff's decisions and recommendations, as set forth in the final documents issued to Respondents and the public. For these reasons, under the facts of this case, little weight is afforded to the general public interest in disclosure of the materials protected by the deliberative process privilege.



C. **Balancing of Interests.** The preceding analysis demonstrates that on the facts of this particular case, the public interest served by not disclosing the records in Categories 3 and 4 protected by the deliberative process privilege clearly outweighs the public interest served by disclosure.

**V. GOVERNMENT CODE SECTION 6253(d)**

The undersigned is the person responsible for denying, in part, your PRA request, for the reasons set forth herein.

Please contact me if you have any questions. Thank you.

Sincerely,



MARC ZEPPELLO

Chief Counsel

MAZ/go